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No. 93 - 1911
~~1991~~

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

CINDA SANDIN, Unit Team Manager,
Halawa Correctional Facility,
Petitioner,

vs.

DEMONT R.D. CONNER, et. al.,
Respondents.

On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

MOTIONS FOR LEAVE TO PROCEED IN FORMA
PAUPERIS AND FOR PERMISSION TO FILE
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI OUT OF TIME

Paul L. Hoffman
Counsel of Record
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(310) 260-9585

Attorneys for Respondent

RECEIVED

SEP 8 1994

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Respondent Demont R.D. Conner moves the Court under Rule 39 for permission to proceed in forma pauperis. Attached to this motion is an affidavit prepared by Respondent indicating that he does not have the funds to hire an attorney to respond to the pending Petition. Respondent's counsel is informed and believes that Respondent has appeared pro se throughout the proceedings in this case to date and was previously granted leave to proceed in forma pauperis in the courts below.

Respondent also seeks permission to file his Opposition to the Petition for a Writ of Certiorari out of time. By the time Respondent was able to obtain the services of Paul L. Hoffman on a pro bono basis, the deadline for filing his Opposition had already expired. As set forth in his Affidavit, Respondent was unable, due to his rehabilitation and other prison commitments, to file the Opposition in a timely manner.

For these reasons, Respondent requests permission to proceed in forma pauperis and to file his Opposition brief submitted with these Motions. This Opposition is submitted at the same time as an Opposition filed in Harper v. Mujahid, No. 94-43, a case

involving similar issues regarding Hawaii prison regulations. Respondent Mujahid is also represented on a pro bono basis by Paul L. Hoffman.

Dated: September 6, 1994

Respectfully submitted,



PAUL L. HOFFMAN
Counsel of Record for
Respondent Conner

MR. DE MONT R.D. CONNER
HALAWA CORRECTIONAL FACILITY
99-902 MOANALUA RD.
AIEA, HAWAII 96701

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

CINDA SANDIN,
PETITIONER,
VS.

No. 93-1911
AFFIDAVIT IN SUPPORT FOR
APPOINTMENT OF COUNSEL

DE MONT R.D. CONNER, ET AL.,
RESPONDENTS.

AFFIDAVIT IN SUPPORT FOR APPOINTMENT OF COUNSEL

I, DE MONT R.D. CONNER, DO HEREBY AVER UNDER THE PENALTY OF
PERJURY THAT:

1. I AM THE RESPONDENT IN THE ABOVE ENTITLED ACTION
AND THAT I MAKE THIS AFFIDAVIT IN GOOD FAITH.
2. DUE TO MY CURRENT REHABILITATIONAL PROGRAMMING AND
WORK COMMITMENTS, I AM UNABLE TO FILE ANY ADEQUATE PAPERS ON
MY BEHALF TO RESPOND TO THE PETITIONER IN THIS ACTION.
3. I DO WANT TO BE HEARD IN THIS ACTION, BASED UPON
THE PETITIONERS' MISCONSTRUCTION OF THE FACTS AND LAWS IN THIS
ACTION.

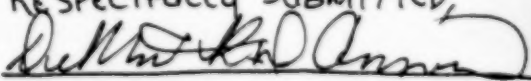
4. BASED UPON THE FACT THAT THE DEFENDENTS IN
MUJAHID V. HARPER, ET AL., HAD FILED FOR CERTIORARI BEFORE THIS
COURT, AND THAT BOTH THE CASES ARE RELATED, RESPONDENT CONNER
SEEKS TO HAVE MR. PAUL L. HOFFMAN, ESQ., OF THE LAW OFFICES OF
PAUL L. HOFFMAN, 100 WILSHIRE BOULEVARD, SUITE 1000, SANTA MONICA,
CALIFORNIA 90401-1198, TO REPRESENT ME IN THIS CASE BEFORE THIS COURT.

5. I AM ONLY AGREEING AT THIS TIME TO ALLOW MR. HOFFMAN
TO PREPARE AN OPPOSITION TO THE PENDING PETITION AND, IF THE PETITION IS
GRANTED, TO REPRESENT ME IN FURTHER PROCEEDINGS ON THE MERITS IN THIS
COURT.

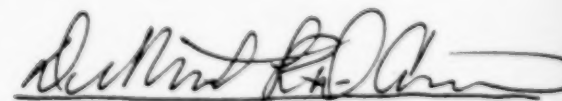
6. I HAVE NO FUNDS TO COVER THE COURT COSTS AND ATTORNEY
FEES IN THIS CASE.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII, JULY 18, 1994.

RESPECTFULLY SUBMITTED,

MR. DE MONT R.D. CONNER

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
AND CORRECT.


DE MONT R.D. CONNER

ORIGINAL

No. 93 - 1191

IN THE
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October Term, 1994

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On Petition For a Writ of Certiorari
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BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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(310) 260-9585

Attorneys for Respondent

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

1. Whether Hawaii's prison regulations created in plaintiff-respondent constitutionally protected "liberty interests" in not being arbitrarily placed in disciplinary segregation and whether these rights were implicated in the prison disciplinary proceedings over which petitioner presided?

2. Whether the Ninth Circuit was correct in deciding that material issues of fact precluded the entry of summary judgment on Respondent's claim that the Due Process Clause of the Fourteenth Amendment requires that inmates be allowed the right to call witnesses at a prison disciplinary hearing regarding the imposition of administrative segregation?

3. Whether in the state of the record the Ninth Circuit was correct in deciding that Petitioner was not entitled to qualified immunity for refusing to permit Respondent to call witnesses at his disciplinary hearing?

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For The Ninth Circuit

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

Respondent, Demont R.D. Conner, submits this brief in
opposition to the Petition for Writ of Certiorari filed by Cinda
Sandin, Unit Team Manager, Halawa Correctional Facility.

STATEMENT

Respondent Demont R.D. Conner is an inmate housed at Halawa
High Security Facility in Hawaii. This case arises out of an
incident on August 13, 1987, in which Respondent was accused of
misconduct in the context of a body cavity search conducted by
prison officials at the Halawa prison facility. Based on the
report of the prison guard responsible for this search Respondent
was charged with misconduct and brought before an "adjustment
committee" established under Hawaii law, on August 28, 1987.
Though Respondent requested the opportunity to present witnesses
to contest these charges at the August 28, 1987, hearing, this
request was denied because "witnesses were unavailable due to
[the] move to the medium facility and being short staffed on the
modules." [Pet. App. at A8]. After the hearing, Respondent was
subjected to disciplinary segregation by the adjustment committee
chaired by Petitioner Sandin.¹

Respondent filed a pro se complaint alleging violations of
his constitutional rights under 42 U.S.C. § 1983 as a result of
the disciplinary segregation. The complaint also raised a
variety of other issues. The Petition before this Court
concerns only Respondent's claim that he was denied Due Process

¹ Though Petitioner urges this Court to find that Respondent
confessed to facts establishing misconduct, this issue is not
before the Court in the context of this Petition. Petitioner does
not claim, nor could she, that Respondent admitted his guilt within
the relevant state regulations.

because Petitioner Sandin denied him the right to call witnesses at the August 28, 1987, disciplinary hearing.²

In September 1991 the District Court granted summary judgment against Respondent on all of his claims. On February 2, 1994, the Ninth Circuit issued an Order³ reversing the summary judgment in part. The February 2, 1994, Order affirms the dismissal of all of Respondent's claims with two exceptions, including the issue presented in the Petition.

The Ninth Circuit found that Respondent had a liberty interest grounded in Hawaii law and protected by the Due Process Clause of the Fourteenth Amendment in being free from disciplinary segregation. Under Hawaii law Respondent could be subjected to disciplinary segregation only if he admitted his guilt of infractions specified in Hawaii law or an adjustment committee found "substantial evidence" of his guilt. [Pet. App. 57-58]

The Ninth Circuit made the further finding that Respondent was entitled, absent an adequate justification by the adjustment

² The State of Hawaii did not challenge the portion of the Ninth Circuit's opinion that struck down the application of a prison rule barring communication in a language other than English to Islamic prayers. [Pet. 9].

³ The Ninth Circuit initially issued its Order reversing summary judgment in part on June 2, 1993. The panel granted a Petition for Rehearing and issued its Amended Order on February 2, 1994. The case was submitted to the panel on the record without oral argument. Respondent has always represented himself in these proceedings until present Counsel agreed to handle any proceedings in this Court on a pro bono basis.

committee, to call witnesses on his behalf at the August 28, 1994, hearing and that this right was "clearly established" at least since this Court's decision in Wolff v McDonnell, 418 U.S. 539, 567-69 (1974). Based on Respondent's declaration stating that Petitioner Sandin was responsible for denying his request to call witnesses on his behalf the entry of summary judgment by the District Court as to her was in error.

The Ninth Circuit remanded the case for further proceedings and specifically indicated that the District Court could revisit the issue of qualified immunity on a more complete factual record. The Ninth Circuit found that it was not possible to determine "without a fuller development of the record" whether a reasonable official could have believed that the denial of Respondent's request to call witnesses was lawful.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT WARRANT REVIEW BECAUSE THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENTS IN FINDING THAT HAWAII'S PRISON REGULATIONS CREATE A LIBERTY INTEREST IN REMAINING FREE FROM DISCIPLINARY SEGREGATION

This Court has consistently held that a "state law may create enforceable liberty interests in the prison setting."⁴

⁴ This Court has held in a variety of settings that prison regulations granted inmates a protected liberty interest in parole, Board of Pardons v. Allen, 482 U.S. 369 (1987); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), in good-time credits, Wolff v. McDonnell, 418 U.S. 539, 556-572 (1974).

Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 461 (1989). Whether state law creates such a liberty interest enforceable under the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. section 1983 must be determined by examining "closely the language of the relevant statutes and regulations" Id. The Ninth Circuit's opinion followed this approach in determining that the Hawaii prison regulations at issue in this case created a liberty interest in being free from disciplinary segregation unless a showing of specific misconduct was shown by "substantial evidence."

In Hewitt v. Helms, 459 U.S. 460, 472 (1983) this Court held that a prisoner who was subject to administrative segregation had a protected liberty interest created under Pennsylvania law. In Hewitt this Court found that the Pennsylvania procedures at issue in that case created a liberty interest in being free from administrative segregation because the state provision "used language of an unmistakably mandatory character, requiring that certain procedures "shall", "will" or "must" be employed...and that administrative segregation will not occur absent specified substantive predicates--viz., 'the need for control' or the threat of a serious disturbance." Id. The case before this Court is similar in that Hawaii's prison regulations are sufficiently mandatory to create a protected liberty interest in a prisoner. As the Ninth Circuit pointed out:

Under Title 17, subtitle 2 (Corrections Division), Department of Social Services and Housing, § 17-201-18(b), the inmate must admit guilt or the prison disciplinary

committee must be presented with substantial evidence before the committee may make a finding of guilt. If the inmate does not admit guilt, or the committee does not find substantial evidence, the particular outcome - freedom from disciplinary segregation - must follow. § 17-201-18(b). [Pet. App. A4]

This regulation clearly states that if the certain substantive predicates which are laid out do not occur then disciplinary segregation may not be imposed. In particular, the adjustment must find a prisoner guilty of special offenses before imposing administrative segregation. This state scheme falls squarely within Hewitt v. Helms and thus there is no reason to revisit this issue by granting the Petition.

Petitioner's primary contention is that this Court's decision in Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 461 (1989) somehow forecloses the finding of a protected liberty interest in these circumstance. However, this Court derived its test in Kentucky Department of Corrections from its holding in Hewitt and expressly reaffirmed Hewitt. The Court stated first that a statute must contain "substantive predicates" or "particularized standards to govern official decision making. Next, the Court stated that the regulation must require in "explicitly mandatory language" that if the substantive predicates are met a particular outcome must follow. Id. at 1909-1910.

In Kentucky Department of Corrections, this Court found that the regulation restricting prisoner visitor privileges at issue in that case "lack[ed] the requisite relevant mandatory language

since visitors "may", but need not, be excluded whether they fall within one of the categories of excludable visitors." Id. at 454. Thus, this Court found that the state regulations were not the kind that created expectations of enforcement sufficient to create a liberty interest in certain forms of visitation.

Petitioner contends that Hawaiian prison regulations at issue in this case are more like the regulations in Kentucky Department of Corrections than the regulations in Hewitt. In particular, Petitioner argues that these regulations are not sufficiently mandatory because they stop short of requiring that a particular result be reached upon a finding that the "substantive predicates" are met because prisoners may not be assigned to segregation even after a finding of guilt.

However, the Ninth Circuit was correct in finding that Hawaii law creates a liberty interest in being free from the imposition of administrative segregation unless the prisoner admits his guilt of specific misconduct defined substantially in state regulations [Pet.App A43-50] or has been found guilty based on "substantive evidence." There is nothing discretionary about these requirements. Administrative segregation may not be imposed unless these substantive predicates are met. Thus, this case falls squarely within Hewitt v. Helms and is not the kind of discretionary visitation regulation at issue in Kentucky Department of Corrections.

II.

THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner argues that the Ninth Circuit's holding conflicts with the holdings of other Circuits in similar cases. In particular, Petitioner claims that Burgin v. Nix, 899 F.2d 733 (8th Cir. 1990) and Woods v. Thieret, 903 F.2d 1080 (7th Cir. 1990), are in conflict with the Ninth Circuit's holding in this case.

In Burgin the issue was whether a prisoner had a liberty interest in eating a "non-sacked" meal as opposed to a nutritionally similar and adequate "sacked" meal. Id. at 734. The Burgin Court never reached the analysis required in Hewitt and Kentucky Department of Corrections but found that there was essentially no difference between "sacked" and "non-sacked" meals that triggered any kind of due process analysis. Id. at 734-735.

Indeed, the Burgin court emphasized that there were no Iowa statutes or regulations guaranteeing that prisoners would receive a specific type of meal. Id. at 735. Under Iowa regulations prisoners who were placed on incorrigible inmate status may be served "sacked" meals "in some cases" and thus the regulations, unlike the regulations at issue in this case, did not have the explicitly mandatory language required under this Court's cases to establish a liberty interest in freedom from "sacked" lunches based on particular mandatory substantive prerequisites. Id.

Nor is the Seventh Circuit's holding in Woods v. Thieret, 903 F.2d 1080 (7th Cir. 1990), in conflict with the decision below. In Woods, a prison inmate challenged three separate "lockdowns" in his cell. The regulations at issue in Woods provided for a disciplinary hearing and possible temporary confinement status based on three criteria. The Seventh Circuit found that these regulations were not sufficiently mandatory under the principles in Kentucky Board of Corrections and Hewitt to create a "liberty interest" of the kind asserted by the prisoner in that case. Id. at 1083. The regulations in Woods were completely different from the regulations at issue in this case. In Woods, the Seventh Circuit held that "while the rules mandate who shall make the determinations and what shall be considered (the three substantive predicates), they do not mandate any particular outcome." Id. Thus, the Illinois regulations considered in Woods did not create any mandatory substantive standards to be found before temporary confinement could be ordered by prison officials. The key difference in this case is that the Hawaii regulations at issue create clear, mandatory substantive predicates before prison officials may impose disciplinary segregation.

There is no conflict between the Ninth Circuit's holding in this case and the holdings in Burgin or Woods. In each case the court applied this Court's analysis in Hewitt and Kentucky Department of Corrections and came to different conclusions because of the different statutory schemes involved.

III.

**THE NINTH CIRCUIT PROPERLY DETERMINED THAT
DEPENDANT WAS NOT ENTITLED TO QUALIFIED
IMMUNITY ON THE RECORD BELOW**

Petitioner contends that the Ninth Circuit has erred in not granting immunity to Petitioner. However, the Ninth Circuit was correct in deciding that Wolff v. McDonnell, 418 U.S. 539, 556 (1974), clearly established Respondent's right to call witnesses at prison disciplinary hearings.⁵

It must be emphasized that the Ninth Circuit was reviewing a grant of summary judgment. As the court below stated "[w]hether a reasonable official could have believed his actions in denying Conner the requested witnesses were lawful is a matter that cannot be decided without a fuller development of the record." [Pet. App. A9]. For this reason alone, the qualified immunity issue advanced by Petitioner is an especially weak candidate for review by this Court.

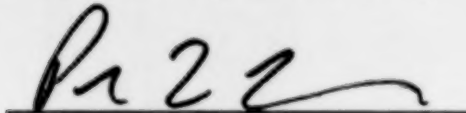
⁵ Petitioner's citation to Elder v. Holloway, 114 S.Ct. 1019 (1994) is puzzling [Pet. 21]. There is no decision not considered by the District Court or Ninth Circuit that calls for the application of Elder.

CONCLUSION

For all of these reasons the Petition should be denied.

DATED: September 6, 1994

Respectfully submitted,



PAUL L. HOFFMAN
Counsel of Record for
Respondent Conner

ORIGINAL

No. 94-43

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PAUL L. HOFFMAN
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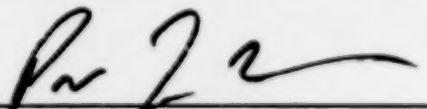
I certify that a copy of the Motions For Leave To Proceed In Forma Pauperis and for Permission To File Brief In Opposition to Petition for Writ of Certiori Out of Time has been sent to counsel for petitioner by U.S. mail, first class, postage prepaid, on September 6, 1994 at the following address:

Steven S. Michaels
Girard D. Lau
Deputy Attorneys General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Monica, California on September 6, 1994.

LAW OFFICES OF PAUL L. HOFFMAN



PAUL L. HOFFMAN
Attorney for Respondents
Demont R.D. Conner